

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LILITH GAMES (SHANGHAI) CO.	)	Case No. 15-CV-01267-SC
LTD.,	)	
	)	ORDER DENYING PROPOSED
Plaintiff,	)	PLAINTIFFS-IN-INTERVENTION'S
	)	<u>MOTION FOR LEAVE TO INTERVENE</u>
v.	)	
	)	
UCOOL, INC. AND UCOOL LTD.,	)	
	)	
Defendants.	)	
	)	
	)	

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Now before the Court is Proposed Plaintiffs-In-Intervention Blizzard Entertainment, Inc. ("Blizzard") and Valve Corporation's ("Valve") (collectively "Proposed Intervenor") motion for leave to intervene. ECF No. 42 ("Mot."). Proposed Intervenor request leave to intervene as of right, or for permissive intervention in the alternative. Plaintiff Lilith Games ("Lilith") and Defendants uCool, Inc. and uCool LTD ("uCool") both oppose the motion. ECF Nos. 61 ("Lilith Opp'n"), 62 ("uCool Opp'n"). Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for disposition without oral argument. For the reasons set forth below, Plaintiffs' motion is DENIED.

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1       **I. BACKGROUND**

2       Plaintiff Lilith is a video game developer that released the  
3 game Dao Ta Chuan Qi (translated as "Sword and Tower")<sup>1</sup> in China in  
4 February 2014. Lilith claims to own the copyrights in Sword and  
5 Tower's computer software. Lilith also claims that it maintains  
6 the Sword and Tower source code as a trade secret. In March 2015,  
7 Lilith decided to release Sword and Tower in other countries  
8 including the United States, Japan, and certain European countries.

9       Defendant uCool is a game marketer who published the game  
10 Heroes Charge in the United States in August 2014.

11       Lilith filed its Second Amended Complaint on August 10, 2015.  
12 ECF No. 83 ("SAC"). In its first claim for relief, Lilith alleges  
13 that uCool unlawfully gained access to Lilith's copyrighted  
14 computer software code embodied in Sword and Tower and copied it  
15 into the source code embodied in Heroes Charge. Because Sword and  
16 Tower is not a United States work as defined in 17 U.S.C. Section  
17 101, Lilith brings its copyright claim under the Berne Convention,  
18 an international agreement governing copyright. In Lilith's second  
19 claim for relief, Lilith alleges that the Sword and Tower source  
20 code is also a trade secret and that uCool misappropriated that  
21 trade secret in violation of California's Uniform Trade Secrets  
22 Act, California Civil Code Section 3426.

23       In support of their copyright and trade secret claims,  
24 Lilith's SAC includes circumstantial evidence of alleged source  
25 code copying. For example, Lilith claims that Heroes Charge

26 \_\_\_\_\_  
27 <sup>1</sup> The game has also been referred to as Dota Legends (see ECF No.  
28 43-01 ¶ 2). Proposed Intervenor also allege that Lilith has  
created and distributed an English-language version of Sword and  
Tower known as Dot Arena. Mot. at 6.

1 includes a portion of Lilith's source code that causes Lilith's  
2 copyright notice to appear at a certain point in the game. The SAC  
3 also includes screenshots illustrating some of the alleged visual  
4 similarities between the two games.

5 Lilith has filed a motion for preliminary injunction seeking  
6 to enjoin uCool from reproducing, copying, preparing any derivative  
7 works, and/or distributing Lilith's source code. The motion will  
8 turn, in large part, on expert analysis of the source code in Sword  
9 and Tower as compared to the source code in Heroes Charge.

10 The instant motion to intervene was filed by Blizzard and  
11 Valve on May 29, 2015. Blizzard and Valve are American video game  
12 developers, holding copyrights in several successful games such as  
13 Warcraft III, World of Warcraft, Diablo III, and Dota 2. Their  
14 proposed complaint-in-intervention alleges that, in developing  
15 Sword and Tower and Heroes Charge, Lilith and uCool copied many of  
16 Blizzard and Valve's best-known characters. They also allege  
17 copying of "certain settings, terrain, background art," and other  
18 visual elements. Mot. at 7. Notably, however, Blizzard and Valve  
19 do not allege that Lilith or uCool copied their source code.

20 The proposed complaint-in-intervention alleges claims of  
21 copyright infringement against both Lilith and uCool. It seeks  
22 preliminary and permanent injunctive relief, damages, attorneys'  
23 fees and costs, and other relief.

## 24 25 **II. LEGAL STANDARD**

### 26 **A. Intervention as a Matter of Right**

27 Federal Rule of Civil Procedure 24(a)(2) provides for  
28 intervention as a matter of right where the potential intervenor

1 "claims an interest relating to the property or transaction that is  
2 the subject of the action, and is so situated that disposing of the  
3 action may as a practical matter impair or impede the movant's  
4 ability to protect its interest, unless existing parties adequately  
5 represent that interest." The Ninth Circuit has summarized the  
6 requirements for intervention as of right under Rule 24(a)(2) as  
7 follows:

8 (1) [T]he [applicant's] motion must be timely; (2) the  
9 applicant must have a 'significantly protectable'  
10 interest relating to the property or transaction which is  
11 the subject of the action; (3) the applicant must be so  
12 situated that the disposition of the action may as a  
practical matter impair or impede its ability to protect  
that interest; and (4) the applicant's interest must be  
inadequately represented by the parties to the action.

13 Freedom from Religion Found. v. Geithner, 644 F.3d 836, 841 (9th  
14 Cir. 2011) (quoting California ex rel. Lockyer v. United States,  
15 450 F.3d 436, 440 (9th Cir. 2006)). Proposed intervenors must  
16 satisfy all four criteria; "[f]ailure to satisfy any one of the  
17 requirements is fatal to the application." Perry v. Proposition 8  
18 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009). In  
19 evaluating motions to intervene, "courts are guided primarily by  
20 practical and equitable considerations, and the requirements for  
21 intervention are broadly interpreted in favor of intervention."  
22 United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir.  
23 2004). "Courts are to take all well-pleaded, nonconclusory  
24 allegations in the motion to intervene, the proposed complaint or  
25 answer in intervention, and declarations supporting the motion as  
26 true absent sham, frivolity or other objections." Sw. Ctr. for  
27 Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001).

1           **B.     Permissive Intervention**

2           Pursuant to Federal Rule of Civil Procedure 24(b)(1), "[o]n  
3 timely motion, the court may permit anyone to intervene who . . .  
4 has a claim or defense that shares with the main action a common  
5 question of law or fact." Permissive intervention "requires (1) an  
6 independent ground for jurisdiction; (2) a timely motion; and (3) a  
7 common question of law and fact between the movant's claim or  
8 defense and the main action." Freedom from Religion Found., 644  
9 F.3d at 843 (quoting Beckman Indus., Inc. v. Int'l Ins. Co., 966  
10 F.3d 470, 473 (9th Cir. 1992)). "Even if an applicant satisfies  
11 those threshold requirements," however, "the district court has  
12 discretion to deny permissive intervention." Donnelly, 159 F.3d at  
13 412. "In exercising its discretion, the court must consider  
14 whether the intervention will unduly delay or prejudice the  
15 adjudication of the original parties' rights." Fed. R. Civ. P.  
16 24(b)(3). "[T]he court may also consider other factors in the  
17 exercise of its discretion, including 'the nature and extent of the  
18 intervenors' interest' and 'whether the intervenors' interests are  
19 adequately represented by other parties." Perry, 587 F.3d at 955  
20 (quoting Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326,  
21 1329 (9th Cir. 1977)).

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23           **III.   DISCUSSION**

24           **A.     Intervention as a Matter of Right**

25                 **1.     Timeliness**

26           A court considers three criteria in determining whether a  
27 motion to intervene is timely: "(1) the stage of the proceeding;  
28 (2) the prejudice to other parties; and (3) the reason for and

1 length of [any] delay [in moving to intervene]." United States v.  
2 Oregon, 745 F.2d 550, 552 (9th Cir. 1984).

3 Lilith and uCool acknowledge that this action is still in its  
4 early stages. They argue that the motion to intervene is  
5 nevertheless untimely because "it would be prejudicial to the  
6 Parties to the underlying Action to allow Proposed Intervenor to  
7 inject new parties, claims, and evidence into this matter." Lilith  
8 Opp'n at 8. Those concerns, however, have little to do with  
9 whether the instant motion is timely. In order to deny a motion to  
10 intervene on the basis of timeliness, the prejudice to the other  
11 parties must be "because of the passage of time." See United  
12 States v. Oregon, 745 F.2d at 553. Because this action is still in  
13 its infancy, Lilith and uCool would not be prejudiced.

14 Accordingly, the Court finds that the motion to intervene is  
15 timely.

16 **2. Significant Protectable Interest and Impairment of**  
17 **that Interest**

18 An applicant has a "significant protectable interest" in an  
19 action if (1) it asserts an interest that is protected under some  
20 law, and (2) there is a "relationship" between its legally  
21 protected interest and the plaintiff's claims. Northwest Forest  
22 Resource Council v. Glickman, 82 F.3d 825, 837 (9th Cir. 1996).  
23 "An applicant generally satisfies the 'relationship' requirement  
24 only if the resolution of the plaintiff's claims actually will  
25 affect the applicant." Donnelly v. Glickman, 159 F.3d 405, 409-10  
26 (9th Cir. 1998) (citations omitted). In addition, an applicant to  
27 intervene must be "so situated that disposing of the action may as  
28 a practical matter impair or impede" its ability to protect its

1 interest. Fed. R. Civ. P. 24(a)(2). A possible stare decisis  
2 effect in the event that factual and legal determinations are  
3 reviewed on appeal "is an important consideration in determining  
4 the extent to which an applicant's interest may be impaired."  
5 United States v. State of Oregon, 839 F.2d 635, 638 (9th Cir.  
6 1988).

7 The Proposed Intervenor's interest in their alleged copyrights  
8 in certain visual elements of their games, while legally  
9 protectable, is not related to the Plaintiff's claims. Lilith  
10 alleges that uCool copied its source code -- a series of  
11 alphanumeric instructions read by a computer to achieve a  
12 particular operation. The Proposed Intervenor, however, do not  
13 claim an interest in Lilith's source code. Instead, the proposed  
14 complaint-in-intervention alleges that Lilith and uCool copied  
15 "certain settings, terrain, background art," and other visual  
16 elements. Mot. at 7. Although the visual elements of a video game  
17 are generated by source code, copyrighted source code is a  
18 protectable literary work distinct from and responsible for much  
19 more than the generation of visual elements in a game. Further,  
20 any given visual element can be generated by different variations  
21 of source code. Thus, the resolution of Lilith's suit relating to  
22 its source code will not affect the Proposed Intervenor. In  
23 particular, if the Court found that Lilith had a valid copyright in  
24 portions of its source code, the Proposed Intervenor could still  
25 pursue an action against Lilith and uCool insofar as Sword and  
26 Tower and Heroes Charge contain infringing visual elements.

27 For these reasons, the Proposed Intervenor do not have a  
28 significant protectable interest related to the Plaintiff's claims.

1 Even if they did, that interest would not be impaired by the  
2 outcome of this action. Accordingly, Proposed Intervenor's request  
3 for intervention as of right is DENIED.

### 4 **3. Adequacy of Representation**

5 Courts consider three factors when assessing whether a present  
6 party will adequately represent the interests of an applicant for  
7 intervention:

8  
9 (1) whether the interest of a present party is such that  
10 it will undoubtedly make all of a proposed intervenor's  
11 arguments; (2) whether the present party is capable and  
willing to make such arguments; and (3) whether a  
proposed intervenor would offer any necessary elements to  
the proceeding that other parties would neglect.

12 Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003).

13 The proposed complaint-in-intervention asserts copyright  
14 infringement claims against both the Plaintiff and the Defendant.  
15 Thus, neither party can adequately represent the interests of the  
16 Proposed Intervenor's.

### 17 **B. Permissive Intervention**

18 Lilith and uCool do not dispute that the Proposed Intervenor's  
19 meet the three threshold requirements for permissive intervention.  
20 They argue, however, that the Court should deny permissive  
21 intervention because it would prejudice their ability to pursue and  
22 defend against the claims in this action. See UMG Recordings, Inc.  
23 v. Bertelsmann AG, 222 F.R.D. 408, 415 (N.D.Cal. 2004) ("[T]he  
24 possibility of prejudice to the original parties is in fact the  
25 'principal consideration' when deciding a motion to intervene.").  
26 Specifically, the parties argue that "[g]iven the distinct subject  
27 matter between Lilith's claim and Proposed Intervenor's claims,  
28 Lilith [and uCool] will have to defend against those claims with



1 different evidence and witnesses than will be at issue in Lilith's  
2 claim against uCool." Lilith Opp'n at 10.

3 The Court agrees that intervention will unduly delay and  
4 prejudice the adjudication of the original parties' case. See Fed.  
5 R. Civ. P. 24(b)(3). The inclusion of the Proposed Intervenor's  
6 additional claims would "necessitate the consideration of  
7 extraneous legal and factual issues that [Plaintiff's] lawsuit  
8 would not otherwise invoke," including questions relating to the  
9 artistic development of characters, settings, terrain, background  
10 art, and other visual elements. UMG Recordings, Inc., 222 F.R.D.  
11 at 414. "Such allegations would divert time and resources from the  
12 principal thrust of [Plaintiffs'] lawsuit and entangle the legal  
13 and factual issues involved therein within a web that is not of the  
14 original parties' making." Id. at 415; see also Hanni v. Am.  
15 Airlines, Inc., No. 08-cv-00732-CW, 2010 WL 289297, at \*7 (N.D.  
16 Cal. 2010) (concluding that judicial economy would suffer with the  
17 addition of a proposed intervenor's new claims and issues because  
18 intervention would require additional discovery, push back  
19 deadlines, and delay the resolution of the existing case). What is  
20 more, the Proposed Intervenor's have the option to bring a separate  
21 action against Lilith and uCool. "While hardly dispositive, [a  
22 prospective intervenor's] ability to pursue its claims through an  
23 alternative mechanism without any prejudice to its own rights is

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1 significant in the context of a motion to intervene brought by that  
2 party." UMG Recordings, 222 F.R.D. at 415.

3 For these reasons, the Court DENIES the Proposed Intervenor's  
4 request for permissive intervention.

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6 **IV. CONCLUSION**

7 For the foregoing reasons, the motion to intervene is DENIED.

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9 IT IS SO ORDERED.

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11 Dated: August 17, 2015



12 UNITED STATES DISTRICT JUDGE  
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